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JAMES H. McKENNEY,
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No. [redacted]134

IN THE

SUPREME COURT OF THE UNITED STATES

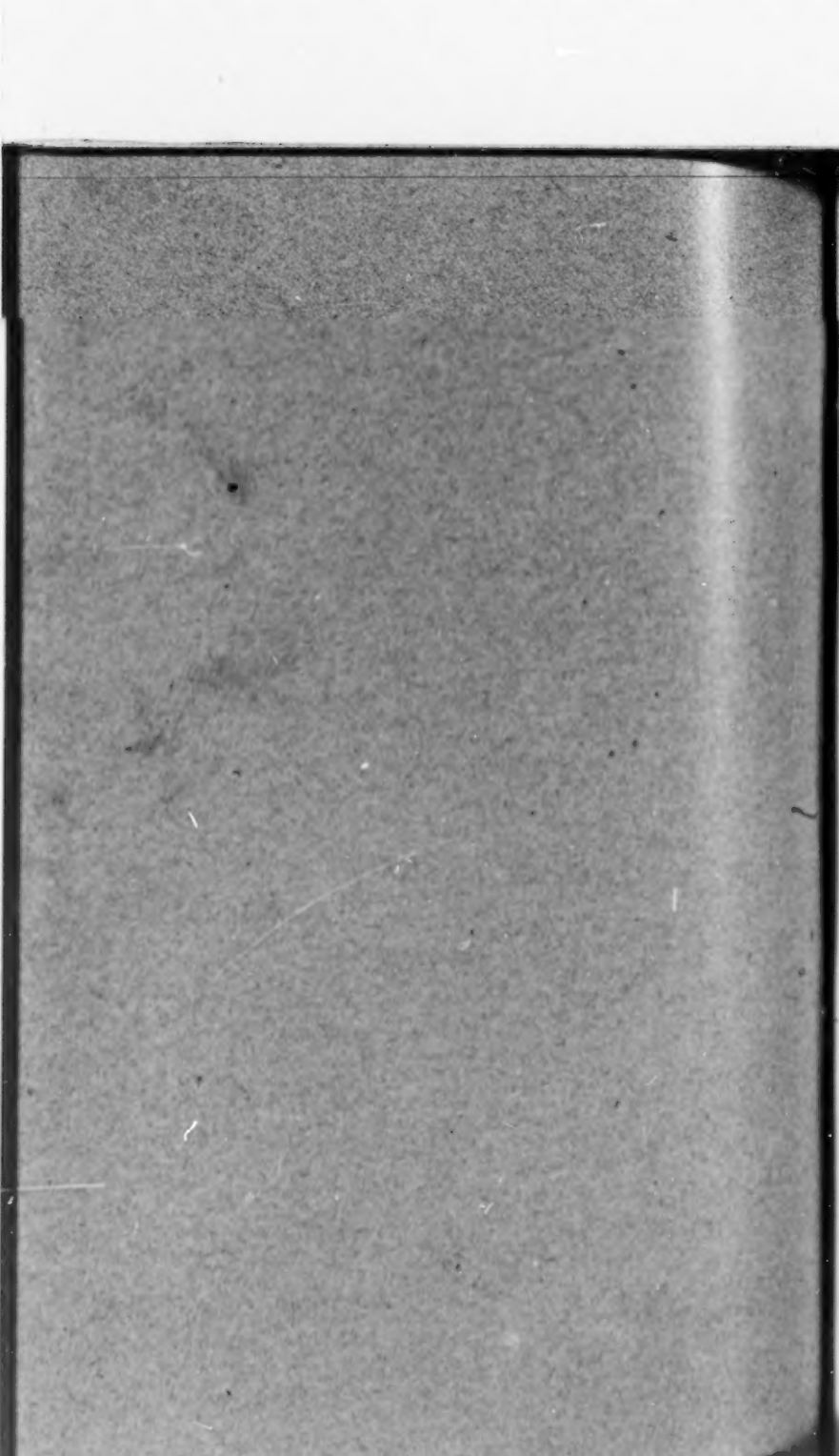
OCTOBER TERM, A. D. 1905.

In the Matter of the Petition of the Erie Railroad Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Seventh Circuit in the Case of the Erie Railroad Company v. the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

PETITION.

C. E. KREMER,
W. O. JOHNSON,
Proctors for Petitioner.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO



IN THE

Supreme Court of the United States

In the matter of the petition of the Erie Railroad Company for a writ of certiorari directed to the Circuit Court of Appeals for the Seventh Circuit, to bring before the Supreme Court the case of the Erie Railroad Company against the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

PETITION.

To the Honorable Judges of the Supreme Court of the United States:

The petitioner respectfully shows to this court:

First—That your petitioner is a corporation and on the 30th day of June, 1896, it merged the Union Steamboat Company in with it by virtue of the laws of New York, and thereby acquired and became possessed of all the estate, property, rights, privileges and franchises of the said Union Steamboat Company in substantially the same manner as the same were held by the latter, and by virtue of such merger it became entitled to collect and claim all debts and claims due the said Union Steamboat Company from any person or party.

Second—That this case grows out of a collision which occurred on the 21st day of October, 1891, between the Propeller New York, then owned by the Union Steamboat

Company, and the Propeller Conemaugh, then, as now, owned by the Erie & Western Transportation Company.

Third—That on the 11th day of November, 1891, the Erie & Western Transportation Company as owner of the Propeller Conemaugh, and as trustee and bailee of her cargo, filed a libel in the District Court of the United States for the Eastern District of Michigan, to recover the sum of $70,000 for damages sustained by the Propeller Conemaugh and her cargo by reason of said collision.

Fourth—The Union Steamboat Company, as the owner of the Propeller New York, filed its answer to said libel, denying all liability for the collision, but claiming that the damage to the New York by reason of the collision, amounted to $3,000.

Fifth—A trial was had in the District Court and the court held both propellers at fault.

The New York, 53 Fed. Rep., 553.

Sixth—This decision was, on petition for re-hearing, reversed and the New York was held solely at fault.

Seventh—That thereupon the following insurance companies filed their petitions and intervened in said cause, claiming damages to the cargo of the Conemaugh, which they had insured in the following amounts:

British & Foreign Marine Insurance Co. (Ltd.)	$ 2,421.84
Insurance Company of North America	7,950.09
Union Marine Insurance Company	8,553.06
Marine Insurance Company	916.57
	$19,841.56

Eighth—To all of the petitions of the above intervenors the Union Steamboat filed its answer, denying all liability

for the collision, and alleging that the fault of the same rested solely upon the Conemaugh.

Ninth—The owner of the New York then prayed an appeal to the Circuit Court of Appeals for the Sixth Circuit and this court reversed the decision of the District Court and held the Conemaugh solely at fault for the collision.

The New York, 87 Fed. Rep., 819.

The petition for a re-hearing was denied.

82 Fed. Rep., 814.

Tenth—A petition for a writ of certiorari was then filed and allowed, and this court held both the New York and Conemaugh at fault for the collision.

The New York, 175 U. S., 187.

Eleventh—In obedience to the mandate issued after this decision the District Court entered a decree which held the New York liable *for all of the cargo damage* and one-half of the damage sustained by the Conemaugh.

Twelfth—A petition was then filed by the owner of the New York, in this court, praying for a writ of mandamus, to issue to the judge of the District Court, to show cause why he should not obey the mandate of the Supreme Court and enter a decree in conformity with its terms. An order to show cause issued and after a hearing this court denied the writ and held that if the owner of the Conemaugh felt itself aggrieved, the remedy was by appeal and not by writ of mandamus.

Ex parte Union Steamboat Co., 178 U. S., 317.

Thirteenth—Thereupon an appeal was prayed from the decision of the District Court in entering the decree above referred to, and a motion was made by the appellees to dismiss the appeal, which was denied.

The New York, 104 Fed. Rep., 561.

Fourteenth—Thereupon the case came up for a hearing on the merits and the decision of the District Court was affirmed.

The New York, 108 Fed. Rep., 102.

Fifteenth—Thereupon a petition for a *writ of certiorari* was filed in this court. This was granted, and the case came up for a hearing, and in its decision this court affirmed the decision of the Circuit Court of Appeals.

U. S. Co. v. *E. & W. Trans. Co.*, 189 U. S., 363.

Sixteenth—The court thereupon issued its mandate and the petitioner was compelled to pay, and did pay, the decree in which the owner of the New York was compelled to pay *all of the* cargo damage.

Seventeenth—Thereupon this petitioner filed its original libel in the United States District Court at Chicago, against the Propeller Conemaugh to recover the sum of $19,734.61, a moiety of the damages paid on account of the cargo of the Conemaugh, and, which it alleged, should have been borne by the Conemaugh, being one-half of the damages arising out of the collision.

A hearing was had in the District Court and on the 24th day of August, 1904, the court awarded the libelant the sum of $28,815, being the amount of the aforesaid claim and interest thereon.

Eighteenth—An appeal was taken and hearing had in the United States Circuit Court of Appeals for the Sixth Circuit, and this court reversed the decision of the District Court and held that the libel should be dismissed, because the questions to be determined in this case were *res adjudicata* in a court of admiralty by reason of the decisions of this court.

Nineteenth—The pleadings in the District Court were

the libel, answer, and agreed state of facts. Petitioner alleges that the Court of Appeals erred as follows:

1st. That the Circuit Court of Appeals erred in holding, as follows:

> (5) "That division of cargo damage was not a right arising *ipso jure* out of the fact of contributory fault on the part of the Conemaugh; and without issue raised thereupon 'of liability of the Conemaugh to her cargo underwriters,' it could not be summarily assumed that because she was found in fault, and liable to the New York for one-half of her damages, she is also liable to the underwriters on her cargo and thus foreclosing defense under the 'special stipulations in her bills of lading,' which are asserted on behalf of the Conemaugh as written therein 'to set up against the claims of underwriters.' * * *
>
> "We are of opinion that adjudication leaves no issue open in the admiralty, between these parties, arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burdens imposed upon one and the other party in the former decree, in contravention of its express terms." Thereby misconstruing the opinion of this court in *New York*, 178 U. S., 317.

The concluding words of which are as follows:

> "But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that under the cases of *The Chattahooche*, 173 U. S., 540; 43 L. Ed., 801; 19 Sup. Ct. Rep., 491; and *The Albert Dumois*, 177 U. S., 240; 20 Sup. Ct. Rep., 595; 44 L. Ed.; this should have been done. This may be so; but it is an entirely new question, *quite unaffected by the case of the New York*, and if the court erred in refusing to allow such recoupment, the remedy is by appeal, and not by mandamus."

2d. The court erred in holding as follows:

> "Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention was renewed here, for independent relief, upon averment that the cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be that as it may, the fact remains that the decree passed, touching all interests with all damages, apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty; with all parties before the court and all issues heard as raised by them respectively."

Thereby misconstruing the opinion of this court in 189 U. S. 366, which is as follows:

> "The decree against it, the New York, now seeks to shift in part to the owners of the Conemaugh; indeed, not to shift it, but virtually vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done. The cargo owner's judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York having been in fault, was responsible for the cargo, and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it. We think that the District Court rightly construed our mandate."

Thereby also misconstruing the opinion of U. S. Circuit Court of Appeals in 108 Fed. Rep., 47, which is as follows:

> "The right of setoff or counter claim or recoupment being in no way presented by any pleading in this

case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*. It was not a defense which the appellant was obliged to then present. The mere fact that there are cross demands will not operate as an estoppel, if, in fact, the cross demand was not presented and adjudicated."

And again on page 107 the courts say:

"The appellants, not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause, did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the Conemaugh. No special equity appearing, this will be no injustice. The motion to remand, with leave to amend the pleadings, is therefore denied."

3d. In holding that the libelant has had its day in court, and has been heard to ask the contribution now demanded in the libel, and that the trial court, the Court of Appeals, and this court has denied such right, and that therefore no independent proceeding can be brought in admiralty to recover contribution, all of which is contrary to the fact as it appears from the decisions of the Court of Appeals and this court, as found in the opinions reported in the cases: 108 Fed. Rep., 47; 178 U. S., 317, and 189 U. S., 363.

4th. Petitioner further alleges that this court, having held that the right of contribution by way of recoupment had not been prayed for by separate pleadings, therefore the owners of the New York could not be heard upon this question, and that the question of whether there should be contribution or not between the New York and Conemaugh as to the cargo damage was not passed upon by it, and was therefore still open and undetermined, and could therefore be made the subject of a separate suit either in admiralty or equity.

5th. That the decision of the Court of Appeals deprives the libelant of its right to recover contribution in a case of collision in which both the New York and Conemaugh have been held at fault, and under the law and practice in admiralty each should bear and pay one-half of the total damages, when such right is not barred or the amount of recovery reduced by any contract or statute or limitations.

That the decision of the Court of Appeals is contrary to law, as petitioner is informed, and deprives the libelant of its day in court, and its right to be heard upon its claim against the Conemaugh for one-half of the damages to her cargo which the New York was compelled to pay, and which the Conemaugh, under the law and practice, should bear and pay.

Wherefore your petitioner prays that this honorable court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Seventh Circuit, to bring up this case to this honorable court for such proceedings as shall seem just.

Erie Railroad Compa
by James P. Sher
General Agen

B. Kremer

Johnson

Proctors for Petitioner.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

James P. Sherwin being duly sworn, deposes and says that he is the agent of the petitioner herein, the Erie Railroad Company; that said petitioner is a corporation; that deponent has read the foregoing petition; that the allegations therein contained are true, of his own knowledge, except as to the matters and things therein stated upon information and belief and as to those matters he believes it to be true, because he has been more or less familiar with the various steps taken in the litigation referred to in the said petition.

James P. Sherwin

Subscribed and sworn to before me this 11th day of October, A. D. 1905.

Walter M. Johnson
Notary Public

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded and the case is one in which the prayer of the petition should be allowed.

D. J. Schuyler

C. W. Greenfield

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In the Matter of the Petition of the Erie Railroad Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Seventh Circuit in the Case of the Erie Railroad Company v. the Propeller Conemaugh, Erie & Western Transportation Company, Claimant.

Brief in Support of Petition.

C. E. KREMER,
W. O. JOHNSON,
Proctors for Petitioner.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO

IN THE

Supreme Court of the United States

In the matter of the petition of the Erie Railroad Company for a writ of certiorari, directed to the Circuit Court of Appeals for the Seventh Circuit to bring before the Supreme Court the case of the Erie Railroad Company vs. the Propeller Conemaugh, Erie & Western Transportation Company, claimant.

BRIEF FOR PETITIONER.

This case arises out of a collision between the Steamer Conemaugh and the Propeller New York, decided by this court.

The New York, 175 U. S., 187.

The court held both steamers at fault and decided that the New York must pay the damages sustained by the owners and insurers of the Conemaugh's cargo.

The case again came before the court upon an order to show cause, directed to the judge of the District Court, who entered a decree under the mandate.

Ex parte Union Steamboat Co., 178 U. S., 317.

In this decision the court held that the question of recoupment not having been decided by it at the former hearing, could not be brought to the attention of this court by a

petition for a writ of mandamus, but must go, if the party feels itself aggrieved, by appeal to the United States Circuit Court of Appeals. Thereupon the Circuit Court of Appeals heard the case on appeal, and decided that the question of the right of the New York to recoup one-half of the cargo damages against the Conemaugh was not at issue before it, because the pleadings praying such recoupment had not been filed, and also holding that the right to recover the moiety of the cargo damage could be made the subject of an independent separate suit. The owner of the New York thereupon petitioned for a writ of certiorari, which was granted, and this court again heard the case,

The U. S. Co. v. *E. & W. T. Co.*, 189 U. S., 363,

and again held affirming the decision of the Circuit Court of Appeals as we construe it, *that the owners of the New York had a right, by an independent suit, to recover the moiety of the cargo damage of the Conemaugh or her owners.*

Thereupon a libel was filed in the United States District Court for the Northern District of Illinois by the Erie Railroad Company, owner of the Propeller New York, against the Steamer Conemaugh to recover from it the sum of $19,734.61 with interest, this being one-half of the damages paid by the owner of the New York to the shippers and insurers of the cargo of the Conemaugh.

The District Court entered a decree for the libelant which the Circuit Court of Appeals for the Seventh Circuit Court reversed; holding that there was jurisdiction in admiralty of a libel for contribution, but that the question of whether there should be contribution or not was *res adjudicata* by virtue of the decisions of this court, above referred to.

We contend that the Circuit Court of Appeals misconstrued the decisions of this court in that regard, and that the

right of the New York to recover contribution by separate and independent suit has not been decided by this court or the Circuit Court of Appeals for the Sixth Circuit.

BRIEF AND ARGUMENT.

The Court of Appeals, we believe, has misconstrued the prior opinions of this court in this case. It holds as follows:

> "The prior proceedings in admiralty, averred in the present libel, were of the character contemplated by the rule for ascertaining, dividing and charging the liability between all the parties in interest. The damages suffered by the steamers respectively and the damage to the cargo of the Conemaugh were assessed, and while aggregate damages to both steamers were properly equalized, the decree charges the cargo damage against the New York alone. Equal division as well of this cargo damage was strenuously sought on behalf of the New York in the final hearing before the trial court, and in both reviewing tribunals upon the same argument and citations which are urged upon this appeal, but such relief was denied. Like contention is renewed here for independent relief upon averment that the burden of cargo damage was thus imposed for want of pleading in the case, setting up the claim by way of recoupment. Be this as it may, the fact remains that the decree passed touching all interests with all damage apportioned as stated. In other words, the respective rights and liabilities of the parties arising out of the collision were thus adjudicated in admiralty with all the parties before the court and all issues heard as raised by them respectively. These conclusions thereupon are unmistakably expressed in the opinions and carried out in the final decree. * * *

> The adjudication of liability arises out of the collision and apportionment thereof which thus appear in, as we believe, the proceeding in admiralty contemplated by the rule (as defined in the *North Star supra* and *Chattahooche supra*) for all cases of maritime collision. It is unquestionably *res adjudicata* upon all matters involved in that contest. * * * We are of opinion that such adjudication leaves no issue open in the admiralty between these parties arising out of the collision; that jurisdiction therein cannot be exercised to enforce equalization of the burden imposed upon one and the other party in the former decree in contravention of its express terms."

The court, therefore, has construed the opinions of this court *as absolutely foreclosing the right of the owner of the New York to recover in admiralty any part of the amount which it paid to the owners of the cargo of the Conemaugh.* The court does not say that the owners of the New York are not entitled to recover the moiety of damages from the Conemaugh, or that this court held that there was no such right.

It simply denies the libelant the right to recover herein through a misconception of what this court had to decide and did decide.

The effect of the decision of the Circuit Court of Appeals is, to deprive the owners of the New York of a clear right to compel the Conemaugh, to share with it the cargo loss arising out of the collision, which this court found and held to have been due to the joint fault of both vessels.

That each of two vessels held jointly at fault should equally bear the damage resulting from such negligence, has been frequently decided and is a rule of damages in admiralty settled beyond all question.

Schooner Catherine v. *Dickinson*, 17 How., 170.
North Star, 106 U. S., 17.

Manitoba, 122 U. S., 97.
The Albert Dumois, 177 U. S., 240.

There is nothing in this case in the way of a limitation of liability under the statutes that is pleaded to take away or limit the rule.

Prior to the decision of the District Court for the Eastern District of Michigan, when it entered a decree on the first mandate in the original case, there was no decided case, and no established practice, that required the filing of a cross libel or petition praying for recoupment, setoff or contribution.

On the contrary in all of the following cases recoupment was allowed without such pleadings.

The Eleonora, 17 Blatch., 88.
Leonard v. *Whitwell*, 10 Ben., 638.
The C. H. Foster, 1 Fed. Rep., 733.
Atlantic M. Ins. Co. v. *Alexandre*, 10 Fed. Rep., 279.
The Canima, 17 Fed. Rep., 271.
The Hercules, 20 Fed. Rep., 305.
The Job T. Wilson, 84 Fed. Rep., 149.
The Livingstone, 104 Fed. Rep., 918.
Albert Dumois, 177 U. S., 240.
Manitoba, 122 U. S., 97.

In fact there is an unbroken line of authorities to support the proposition that additional pleadings, besides libel and answer, were not necessary to enable a Court of Admiralty to properly apportion the damages between wrongdoers, when these were the libelant and defendant then before the court.

The District Court, however, held in this case that it could not be done without a cross libel or petition—the Cir-